LIBRARY
SUPREME COURT, U. S.

FILED
OCT 17 1968
JOHN F. DAVIS, CLERK

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 549

JOHN D. SENCHAL and GRACE SENCHAL, husband and wife, and THELMA HARKREADER,
Petitioners,

VERSUS

V. H. CARROLL, Trustee,
Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

HARRY L. DYER
1501 Fourth National Bank Building
Tulsa, Oklahoma

ROBERT C. BAILEY
200 Hightower Building
Oklahoma City, Oklahoma 73102

THOMAS G. MARSH
1501 Fourth National Bank Building
Tulsa, Oklahoma

Counsel for Appellee

October, 1968

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY, PH. CE 5-0030

SUBJECT INDEX

	PAGE
Statement of the Case	1
Reason for Denying Writ	6
An action by a trustee in bankruptcy to set aside a fraudulent conveyance has long been cognizable in equity and hence the Seventh Amendment to the United States Constitution is inapplicable to such a claim as is Section 42(c) of the Bankruptcy Act	6
Conclusion	14

AUTHORITIES

CASES:

Barnard v. Coen, 9th Cir. 1923, 8 F.2d 13	7
Beacon Theatres, Inc. v. Westover, 359 U.S. 509, 79 S.Ct. 948	10
Benedict v. Seiberling, 17 F.2d 831	13
Clifton Park Manor, Sec. 1 v. Mason, 137 F.Supp. 324 (1955)	12
Dairyqueen Inc. v. Woods, 169 U.S. 469 (1962)	10
Dansky v. Zavatt, 289 F.2d 46 (1961)	6
Hobbs v. Hull, 1 Cox Ch. 445, 29 E.R. 1242 (1788)	6
Hummel v. Wells Petroleum, 7 C.C.A., 111 F.2d 883 (1940)	8
Johnson v. American Hawaiian SS Co., 9 C.C.A., 98 F.2d 847 (1938)	8
Johnson v. Gardner, 9 Cir., 1949, 179 F.2d 114, cert. den. 1950, 339 U.S. 935, 70 S.Ct. 661, 94 L.Ed. 1353	6-7, 7-8
Kemp Booth Co. v. Calvin, 9th C.C.A. 1936, 84 F.2d 377	7

INDEX CONTINUED

	PAGE
Rader v. Boyd, C.C.A. 10, 252 F.2d 585 (1958)	11
Ring v. Spina, et al., 2 C.C.A., 166 F.2d 547 (1948)	8
Schoenthal v. Irving Trust Co., 278 U.S. 192, 53 S.Ct. 50 (1938)	8
Upstein v. U. S., 196 Fed. 354, cert. den. 223 U.S. 731	13
W. A. Mack, Inc. v. General Motors Corporation, 260 F.2d 886 (1958)	12
Williams v. Collier, D.C. Pa. 1940, 32 F.Supp. 321	8-10
5 Moore, Fed. Practice, 2nd Ed. (1951), p. 176	7

In the
Supreme Court of the United States

No. 549

JOHN D. SENCHAL and GRACE SENCHAL, husband and wife, and THELMA HARKREADER,
Petitioners,

VERSUS

V. H. CARROLL, Trustee,
Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

TO THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondents respectfully urge that the Petition for Writ of Certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit filed herein, be denied.

STATEMENT OF THE CASE

This action was initiated by the respondent, V. H. Carroll, Trustee of the Estate of Raymond H. Gestes, Bankrupt, hereinafter referred to as plaintiff, against the defendants, John D. Senchal and Grace Senchal, husband and wife, and Thelma Harkreader, petitioner, hereinafter re-

ferred to as defendants, praying an order of the court directing that certain specific property be turned over to the plaintiff by the defendants and that they be required to account for rents, and profits derived therefrom while the same was under their custody and control. *No money judgment or damages were sought.*

The statement contained in the petition, while for the greater part correct, is both incomplete and inaccurate in certain aspects as hereinafter set out.

This action arose as a result of an involuntary bankruptcy petition filed against Raymond Henry Gestes in January of 1966 and his subsequent adjudication in bankruptcy. The alleged bankrupt filed a confession of bankruptcy and was adjudicated a bankrupt and the case referred to the Honorable William T. Billups, Referee in Bankruptcy for the United States District Court for the Western District of Oklahoma.

After filing of the bankruptcy schedules, and lengthy hearings before the Referee in Bankruptcy, it developed that within one year prior to bankruptcy, the bankrupt had transferred to the defendants, Grace Senchal, a sister, and John D. Senchal, a brother-in-law, and Thelma Harkreader, a sister of the bankrupt, certain property, real and personal. An application for turn over order was filed before Judge Billups and an order to show cause directed to the defendants in this action issued. At a subsequent hearing, Judge Billups denied summary jurisdiction of the court, continued a temporary injunction in full force and effect and directed that plenary proceedings be filed by the trustee to recover this property. Pursuant to this instruction, the instant action was filed.

The application for preliminary injunction was heard before the Honorable Luther Eubanks, Judge of the United States Court for the Western District of Oklahoma, on May 6 through May 11, 1966.

Contrary to the statement in the petition, that only the testimony of the defendants was considered at this hearing, there was offered for the court's consideration the testimony of some eleven witnesses and in excess of 113 plaintiff's exhibits were introduced in evidence in four full days of trial.

Exhibits considered by the court included all banking records of the bankrupt; banking records of the defendant Senchal including canceled checks and banks' statements covering a period in excess of ten (10) years; deeds, mortgages, bills of sale of property both real and personal; and federal and state tax returns filed by the defendant Senchal from 1949 through 1964.

Typical of the transactions between the bankrupt and the defendants is the following example:

> "June 29, 1965, bankrupt withdraws $35,000 from his bank account at the Oklahoma National Bank in the form of cashier's checks (Supp. R. 10) and within three (3) days following, converted the same into cash in the form of $100 bills (Supp. R. 25) (R. 546-541);
>
> "July 12, 1965, John and Grace Senchal deposit $35,000 in $100 bills in their bank account at the Capitol Hill State Bank and Trust Company (Supp. R. 50);
>
> "July 14, 1965, John Senchal writes a check to the bankrupt for $35,000 purporting to be payment for the

bankrupt's equity in a farm in Payne County, horses and implements of husbandry, as well as all improvements, which property comprises the bulk of the assets sought to be recovered in this action by the trustee (Supp. R. 51)."

The bankruptcy schedules filed by the bankrupt indicated transfers of property within one year next preceding bankruptcy in excess of $109,000 and debts as of the date of bankruptcy in excess of $550,000, for a total depletion of his estate in excess of $659,000 within one year next preceding the filing of the petition in bankruptcy.

No tangible assets were scheduled.

The bankrupt sought to explain these losses by his unconfirmed statement that "he gambled away every penny he had" (R. 538, 598, 601, 721, 1037, 1038).

The only explanation offered by defendant Grace Senchal for her sudden affluence was her unconfirmed statement that she had amassed an excess of $80,000, in cash, in $100 bills, over a period of years from unconfirmed gifts from persons deceased and savings out of her grocery money.

John Senchal admitted that he had not knowingly contributed any funds towards these savings or, in fact, knew of their existence until July of 1965.

Defendant Thelma Harkreader likewise explained her wealth as having been acquired from unconfirmed gifts from men friends and former husbands, totaling in excess of $160,000 in cash, in $100 bills.

Willis Harkreader, the husband of the defendant Thelma Harkreader, testified that he had not contributed

to these savings or knew of their existence (Supp. R. 117, 118, 119).

At the time of trial, some five former husbands in addition to the testimony of Mr. Harkreader, her present husband, testified that they had not contributed to these savings or believed Thelma Harkreader to have amassed this amount of money (R. 633, 642, 657, 666, 836).

Both defendants Thelma Harkreader and Grace Senchal admitted that none of these funds had ever been banked, declared as income for tax purposes, or declared as cash savings for purposes of personal properties tax, although they admitted sworn returns had been filed.

John Senchal admitted that the funds on deposit with the Stockyards Bank were derived through the sale of race horses and winnings at various tracks during the period July of 1956 to January of 1966 (R. 265 through 270). He further testified that he withdrew funds upon it being indicated that the Referee in Bankruptcy would issue an injunction enjoining their disposition (R. 270).

Mr. Senchal admitted that the $10,000 exhibited at the time of the preliminary hearing were funds withdrawn from the Stockyards Bank and derived from the sale of horses and track profits (R. 269, 446, 447, 448).

The bankrupt admitted insolvency prior to the transfer and his accountant testified he, the bankrupt, had instructed her "to pay no one as early" as May 1965 and two months prior to the transactions here involved (Supp. R. 61, 62).

The trial court entered an order on May 18, 1966, granting a motion for preliminary injunction and ordering

the funds exhibited by Mrs. Senchal impounded by the clerk and further enjoined disposition of two automobiles then in possession of the bankrupt, Raymond Gestes, but titled in the name of one of the defendants, Thelma Harkreader, which titles had been endorsed in blank by Thelma Harkreader (R. 2168, 2169).

The first indication of dissatisfaction with Judge Eubanks came in the form of a letter from the defendant Thelma Harkreader to her then attorney, V. P. Crowe, with a copy to Judge Eubanks. Mr. Crowe withdrew from the case and it was not until plaintiff had the case set for pre-trial that new counsel was employed.

At the initial and subsequent pre-trial conferences, the court considered the defendants' request for jury trial and request that he disqualify, subsequently denying jury trial and stating that he did not feel himself disqualified, but on the contrary, felt obligated not to disqualify himself.

REASON FOR DENYING WRIT

An action by a trustee in bankruptcy to set aside a fraudulent conveyance has long been cognizable in equity and hence the Seventh Amendment to the United States Constitution is inapplicable to such a claim as is Section 42(c) of the Bankruptcy Act.

For want of better language, the reason above stated is taken for the greater part directly from language used by the Court in *Dansky* v. *Zavatt*, 289 F.2d 46 (1961) citing *Hobbs* v. *Hull*, 1 Cox Ch. 445, 29 E.R. 1242 (1788); *Johnson* v. *Gardner*, 9 Cir., 1949, 179 F.2d 114, *certiorari denied* in 1950, 339 U.S. 935, 70 S.Ct. 661, 94 Lawyers

Edition 1353; 5 Moore, *Fed. Practice,* 2nd Edition (1951), p. 176.

As in the case at bar, the *Johnson* v. *Gardner* case involved an action brought by a trustee in bankruptcy in a plenary suit to avoid certain transfers of property alleged to have been made to relatives of the bankrupt without consideration and with intent to hinder, delay and defraud the creditors of the bankrupt. We respectfully submit that this case is on all fours with the present action and that the only distinguishing factor is that in the *Johnson* case money judgment was asked in addition to the avoidance of the transfers, while in the instant action, no money judgment was asked or granted.

In affirming the trial court's denial of jury, the Court stated in *Johnson* v. *Gardner, supra:*

> "It is pellucidly clear from a consideration of the pleadings, finding, conclusions and judgment in the record before us that the action of the district court was entirely and essentially one of equitable cognizance."

In affirming the trial court's denial of jury trial, the Court in the *Johnson* case cited *Barnard* v. *Coen,* 9th Cir. 1923, 8 F.2d 13, and *Kemp Booth Co.* v. *Calvin,* 9th C.C.A. 1936, 84 F.2d 377, and stated at page 117 of 179 F.2d:

> "There was no demand for monetary relief except such as might be awarded against the bankrupt as corollary to an accounting which is in an historic field of equity jurisprudence.
>
> "The gravamen of the suit and the crucial issue in it is the fraud that is alleged in the amended complaint to be the actuating means of the conveyances of real

property which the trustee seeks to recover for the bankrupt estate. Thus the wrong wrought by the fraud is not remediable at law in any efficient and practical way, and the historical equitable relief by cancellation of record is the only adequate and complete remedy.

> "Under such a situation, while it is true that the fraud alleged in the amended complaint is a question of fact in the suit, it is not one which under the record the chancellor was required to call the jury to decide." [Citing *Hummel* v. *Wells Petroleum*, 7 C.C.A., 111 F.2d 883 (1940); *Johnson* v. *American Hawaiian SS Co.*, 9 C.C.A., 98 F.2d 847 (1938).]

The Court in *Johnson* v. *Gardner, supra*, also dealt with the application of Sec. 19C of the Bankruptcy Act to facts similar to those in the case at bar stating:

> "Primarily, it is to be noted that the statutory provisions respecting the absolute right to jury trial in involuntary proceedings in bankruptcy in Section 19 of the Bankruptcy Act, Title 11 USCA, Sec. 42, have no application in this matter."

The right to a jury in the domain or field of equity such as is here involved is determinable by the issues of fact that are pleaded in the suit and the type and quality of remedies that are applicable and available to the suiter. This has been the yardstick which has been applied under both the ancient divisions of law and equity and the single action in the unified procedures under the federal rules. *Ring* v. *Spina, et al.*, 2 C.C.A., 166 F.2d 547 (1948); *Schoenthal* v. *Irving Trust Co.*, 278 U.S. 192, 53 S.Ct. 50 (1938); *Williams* v. *Collier*, D.C. Pa. 1940, 32 F.Supp. 321.

In *Williams* v. *Collier, supra*, a trustee sought to avoid a fraudulent transfer of assets and accounting and judg-

ment for the fair market value of the assets involved. The Court read into the case a prayer for an accounting and stated:

> "Where, in addition to seeking a money judgment, the bill of the trustee alleged facts calling for additional relief of an equitable nature, the two decisions appear to be in agreement that the case properly was before a court of equity."

We respectfully invite the Court's attention to the fact that in the instant case no money judgment was sought nor was one granted. The Court in *Williams* v. *Collier,* dealt with a question of mixed equitable and legal action and held that where money judgment was incidental to an equitable action for an accounting and avoidance of fraudulent transfer, the matter was one in equity. In the instant case, no such problem exists and it would thus seem clear that the defendants were not entitled to a jury.

With regard to a request for an accounting, for rents or profits derived by the defendants from property fraudulently transferred to them, the Court in *Williams* v. *Collier* set out:

> "A common instance of an accounting of a strictly equitable nature is that sought by cestui que trust from a trustee; and this is so in connection with constructive trusts (citing cases). In *Buffum* v. *Barceloux Co.,* Justice Cardozo applied the doctrine to the case of a fraudulent transferee of shares who had reconveyed to another. The Court declared . . . that the fraudulent grantee could be held as a trustee maleficio for the value of the shares and reiterated the rule that 'the trustee who misapplies the subject matter of a trust becomes accountable at once for the proceeds or the value.' In the instant case, plaintiff also seeks an

> accounting from the allegedly fraudulent transferee and demands expressly that Bertha Collier be declared a trustee maleficio. It would appear, therefore, that plaintiff's remedy in this respect is one formerly cognizable in equity."

The Court further observed that such being the case, they need not pass upon whether or not the transactions alleged were complex as to render a jury trial impractical.

It is thus necessary in order to determine the validity of defendants' demand for jury trial to examine and consider the nature of the relief requested in plaintiff's complaints, the facts alleged and the relief granted.

An examination of the pleadings, findings of fact, conclusions of law, and judgment in this case, readily reveals that this action was not based upon breach of contract, nor did it seek money damages as was the issue in *Dairyqueen Inc.* v. *Woods,* 169 U.S. 469 (1962), nor is it sought to enjoin the filing of an action by the defendant, which had the defendant filed it, would have been purely legal as in the *Beacon Theatres, Inc.* v. *Westover,* 359 U.S. 509, 79 S.Ct. 948.

The Court, in the *Dairyqueen* case, *supra,* recognized the proposition that in certain instances of a complex nature equity might take jurisdiction over a matter couched in law stating:

> "The necessary prerequisite to the right to maintain suit for equitable accounting is the absence of an adequate remedy at law and in order to maintain such a suit on a cause of action cognizable as one at law, plaintiff must be able to show that accounts between the parties are of such a complicated nature that only a court of equity could satisfactorily unravel it."

It is respectfully submitted that the instant case required nine full days of trial by the court and consideration of numerous witnesses and in excess of 400 exhibits, many of which were many pages in length and covered a period of many years. It is thus apparent that the transactions between the defendants and the bankrupt were of an extremely complicated nature and required the consideration of a trained and perceptive mind.

Certainly it cannot be said in the instant action that the appellants were deprived of their right to jury trial on their cross-complaint, for, in fact, no right to a jury on their claim existed. That the filing, proof, and allowance or rejection of claims against the bankrupt is a matter of purely equitable jurisdiction has many times been recognized by our Courts. In *Rader* v. *Boyd*, C.C.A. 10, 252 F.2d 585 (1958), Chief Judge Murrah stated:

> "A court of bankruptcy is a court of equity, exercising equitable powers of broad sweep, and, within the statutory scheme, the court may exert such powers in full vigor with respect to allowance, rejection or subordination of claims. It is empowered to shift the circumstances surrounding any claim to see that injustice and unfairness is not done in the administration of a bankrupt estate."

It is therefore urged that in the instant action the suit was based solely and exclusively on a prayer for relief of an equitable nature in that plaintiff, appellee, sought only to have restored to the bankrupt estate that which had been wrongfully transferred by the bankrupt within one year next preceding the filing of the bankruptcy, and for an accounting by the defendants, for the rents, profits and gain while the property was in their possession.

It is further respectfully submitted that no dissatisfaction was found with Judge Eubanks or expressed by any of the defendants until approximately one month following his decision on plaintiff's application for preliminary injunction. On June 9, 1966, a letter was written to Mr. V. P. Crowe, the then attorney for the defendants in this action, with a copy sent to Judge Eubanks, part of which we quote:

> "You see, Mr. Crowe, what you shyster lawyers and unscrupulous Federal Judges failed to realize is, in this modern day, some of us average citizens, who know what this country is all about, can spot a fix in a court room as surely as a dog can smell a coward."

The burden which must be sustained by a party seeking a preliminary injunction is indeed a heavy one as has been many times recognized. In *Clifton Park Manor, Sec. 1* v. *Mason*, 137 F.Supp. 324 (1955), Court stated:

> "A party who seeks a preliminary injunction must not only allege facts as to which there is not serious dispute but must also indicate facts showing that he has reasonable probability of success upon final hearing."

Further, the Court in *W. A. Mack, Inc.* v. *General Motors Corporation*, 260 F.2d 886 (1958), stated:

> "A preliminary injunction should not issue unless complaint can be construed to make out a prima facie case."

It was thus necessary before Judge Eubanks could grant plaintiff's application for a preliminary injunction to ascertain that the complaint was sufficient, that plaintiff

was likely to suffer irreparable damage if the injunction did not issue, and that there was reasonable probability that the petitioner would prevail at the time of trial.

Contrary to statements in the petition the court considered testimony of numerous witnesses and well over 100 exhibits in reaching an affirmative conclusion with regard to the guide lines set out above. This hearing took four and one-half days of trial before the court.

In *Benedict* v. *Seiberling*, 17 F.2d 831, the Court held:

> "Adverse judicial action cannot be made the basis for disqualification unless facts and reasons are alleged which show that the judge was biased or prejudiced."

See also *Upstein* v. *U. S.*, 196 Fed. 354, *certiorari denied* 223 U.S. 731.

We therefore urge that while the language used by the judge was strong in stating his opinion and decision on application for preliminary injunction, he was not, as a result of the expression of his opinion, disqualified from hearing the case at the actual trial. His words did not reflect prejudice, but rather the strength of his convictions.

Perhaps the best insight into the judge's feelings and convictions can be found in his own words. In a letter to Mr. Jack E. Wilson, the attorney hired to represent the defendants after Mr. Crowe had been discharged, Judge Eubanks set out his position most clearly. We quote from the second grammatical paragraph of that letter:

> "I have made a complete search of my soul and conscience many times in connection with this matter and have invariably reached the same answer which is

that I am not disqualified in this case as a matter of fact. I further believe that I am not disqualified as a matter of law by reason of the remarks I made at the conclusion of the first hearing in the case. I believe that my findings and orders were fully justified and supported by the evidence at that hearing and say quite frankly that absent new and additional evidence upon further hearing my opinion would remain the same, however you may be assured that any final decision I make in this or any other case will be based upon all the facts then before me. I have found no difficulty in changing my mind when later facts show I was initially wrong."

It is urged that Judge Eubanks' actions, in the face of complexity and threat, were motivated solely by logic and discretion, in keeping with the finest traditions of the Federal Judiciary.

CONCLUSION

By reason of the foregoing, it is respectfully urged that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

HARRY L. DYER
1501 Fourth National Bank Building
Tulsa, Oklahoma

ROBERT C. BAILEY
200 Hightower Building
Oklahoma City, Oklahoma 73102

THOMAS G. MARSH
1501 Fourth National Bank Building
Tulsa, Oklahoma

Counsel for Appellee

October, 1968